ADVOCATES
FOR HIGHWAY
AND AUTO SAFETY

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20004

May 10, 1996

FHWA Docket No. MC-96-06
Federal Highway Administration
Docket Clerk, Office of the Chief Counsel
Room 4232
U.S. Department of Transportation
400 Seventh Street, SW
Washington, DC 20590

FHWA-97-2277-17

Safety Performance History of New Motor Carrier Drivers
Notice of Proposed Rulemaking, 61 FR 10548 et seq., March 14, 1996

The Federal Highway Administration (FHWA) proposes to amend its regulations in 49 Code of Federal Regulations (CFR) Part 391 to specify minimum safety information that new and prospective employers shall seek from former employers during the investigation of a commercial driver's employment record and to increase the period of time for which motor carriers shall record crash information in the crash register from one to three years. This Notice of Proposed Rulemaking (NPRM) has been issued in order to conform federal motor carrier safety regulations to the requirements of the Hazardous Materials Transportation Authorization Act of 1994 (the Act), P.L. 103-311, August 26, 1994, 108 Stat. 1677 (49 U.S.C. 5101 note).[1]

[1]Title I of the Act contains provisions uniquely directed to hazardous materials transport safety improvements as well as other provisions intended by Congress to enhance the safety operation of all motor carriers in interstate commerce. Section 114 of the Act, as well as a few other provisions, addresses motor carriers in general.

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Section 114 of the Act provides:

(a) AMENDMENT OF REGULATIONS.--Within 18 months after the date of enactment of this Act, the Secretary of Transportation shall amend section 391.23 of title 49, Code of Federal Regulations (or successor regulations thereto), to--

(1) specify the safety information that must be sought under that section by a motor carrier with respect to a driver;

(2) require that such information be requested from former employers and that former employers furnish the requested information within 30 days after receiving the request; and

(3) ensure that the driver to whom such information applies has a reasonable opportunity to review and comment on the information.

(b) SAFETY INFORMATION.--The safety information required to be specified under subsection (a)(1) shall include information on--

(1) any motor vehicle accidents in which the driver was involved during the preceding 3 years;

(2) any failure of the driver, during the preceding 3 years, to undertake or complete a rehabilitation program under section 31302 of title 49, United States Code (relating to limitation on the number of driver's licenses), after being found to have used, in violation of law or Federal regulation, alcohol or a controlled substance.

(3) any use by the driver, during the preceding 3 years, in violation of law or Federal regulation, of alcohol or a controlled substance subsequent to completing such a rehabilitation program; and

(4) any other matters determined by the Secretary of Transportation to be appropriate and useful for determining the driver's safety performance.

(c) FORMER EMPLOYER.--For purposes of this section, a former employer is any person who employed the driver in the preceding 3 years.[2]

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[2]Senate Report No. 103-217, December 9, 1993, accompanied S. 1640 following passage of the House bill, H.R. 2178, which was amended by substituting the text of S. 1640. Section 114 of the Senate Report's Section by Section Analysis largely tracks the language of the Act, save for the last paragraph which indicates that Congress expects DOT to set appropriate penalties for application to motor carrier employers who do not comply with the

(continued...)

This rulemaking proposal is being issued at a time when Congress expected new regulations to have been in place and in operation to secure the benefits of closer federal and employer oversight of motor carrier safety practices in the area of commercial motor vehicle driver behavior.[3] Furthermore, although the direction that Congress provided to the FHWA in the Act is unambiguously clear on its face, the agency has taken the liberty of departing from the mandated statutory scheme in a number of major ways.

First, although Congress asserted that **any** accidents of a driver shall be made available to a new and prospective employer within 30 days, the FHWA has proposed curtailing the definition of 'accident' to the features currently listed in 49 CFR § 390.5, including incidents involving only a driver's operation of a commercial motor vehicle, towaway property damage, or injury to any person involved in the accident who receives medical treatment at some location other than the site of the accident. 61 FR 10548,

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[2](...continued)
regulations implemented pursuant to this section. The instant rulemaking proposal from the FHWA is, however, silent on any sanctions that might be triggered by failure to conform to its interpretation of the statutory directives of Section 114.

[3]Meeting Congressional deadlines for time-certain rulemaking actions, including issuance of final rules, is the rare exception in the Office of Motor Carriers rather than the rule. Rulemaking on entry-level driving training, for example, is two and one-half years overdue and the FHWA has just issued a docket requesting comments on the agency's consultant findings on the inadequacy of truck driving training efforts among motor carriers. The comment period on a report -- not on a proposed rule -- is **six months**, closing on October 22, 1996.

10550. The agency apparently believes that a unqualified statutory command from Congress can be modified at its discretion to suit compatibility with a pre-existing regulatory regime. Congress, however, knew exactly what it was doing when it repeatedly stressed the word 'any' at the start of each of the four paragraphs of subsection (b) of Section 114, including its emphatic insistence on the transmission of all accidents in which a driver had been involved in the previous three years.

Moreover, the Senate Report accompanying the bill for Presidential signature contains a Congressional Budget Office cost estimate, regulatory and economic impact statements, and an assessment of the paperwork burdens involved. Congress asserted that "[t]his legislation would impose some additional paperwork and recordkeeping obligations upon affected persons." S. Rep. No. 103-217, 103rd Cong., 2nd Sess. 7 (1994) published in 1994 U.S.C.C.A.N. 1763, 1769. Congress was cognizant that the provisions of the Act, including Section 114, imposed new and more extensive obligations on both the agency and employing motor carriers in order to elevate commercial vehicle safety. Yet the agency has seen fit to conduct business as usual and to regard a statutory command as little more than a guideline to be accommodated to the logic of the agency's regulatory scheme. This is clearly a violation of federal law.

Second, the FHWA unilaterally alters the statutory mandate of Section 114(b)(3) calling for transmission of information for the

preceding three years regarding **any** use by a motor carrier driver of alcohol or drugs in violation of law or federal regulation of alcohol or controlled substances after completing a drug or alcohol rehabilitation program. Id. at 10551-10552. The agency defeats the legislative purpose of the Act in closely tracking a driver's post-rehabilitation behavior to determine if there has been any recidivism by confining what constitutes a violation of law or federal regulations governing the use of alcohol or controlled substances to only those violations already listed in 49 CFR Part 382, Subpart B. The FHWA protests that it is "impractical" for it to be required to enforce a rule requiring a motor carrier to investigate all illegal uses of drugs and alcohol because such a requirement lies outside of its regulatory authority. Id. at 10551.

The agency does not entertain the possibility that the purpose of Section 114 of the Act is to extend the reach of federal authority to ensure improved public safety on our streets and highways. Moreover, the grounds for disqualification of a commercial vehicle driver under 49 CFR § 391.15 concerning illicit alcohol and drug use lie beyond the prohibitions of 49 CFR Part 382, Subpart B. For example, whereas Subpart B's restrictions on alcohol consumption revolve around a driver's on-duty motor carrier responsibilities, especially the performance of safety-sensitive functions, § 391.15 disqualifies drivers if they have been found to

have driven **any** motor vehicle, not just trucks and buses, while under the influence of alcohol or Schedule I drugs and other controlled substances. The agency cannot presume that Congress is ignorant of the differences in federal regulation in different parts of the Federal Motor Carrier Safety Regulations (FMCSRs) and of the existing limitations of those regulations. The FHWA must recognize that, in order to ensure a better record of motor carrier driver safety and performance, Congress found it necessary for the FHWA to go beyond the existing regulatory regime to capture more critical information on potentially hazardous behavior by a candidate employee. The agency, however, dismisses this Congressional goal because it falls outside the margins already determined in the FMCSRs and, consequently, cannot be regarded as a legislative initiative that expands FHWA's responsibilities and requires the amendment of relevant sections of the FMCSRs. Such a thought is apparently inconceivable to the agency.

Third, the agency again unilaterally abbreviates the reach of the statutory mandate of Section 114 of the Act by arguing that, because of differences between the drug and alcohol testing programs of 49 CFR Part 382 and Part 391, the FHWA will not require new or prospective employers to obtain the information maintained by other employers prior to January 1, 1995, for large employers and prior to January 1, 1996, for small employers. Id. at 10552. In some instances, this will mean that a final rule issued this

year would absolve many employers from transmitting relevant driver information for the major part of the three-year time frame required in Section 114.

The agency does not have the discretion to establish these threshold dates which subvert the clear direction and purposes of the Act. There is no statement in the statute that could be interpreted to indicate that the collection of data on driver safety performance histories was to have only prospective effect upon the issuance of implementing regulations by the FHWA. When Congress directed that implementing rules be in place by February 1996, it gave no discretion to the agency to declare that driver safety information for the preceding three years would be mostly exempted from retrieval and transmission. If the FHWA issues a final rule this year, it has no discretion to declare that the portion of the information falling within the three-year time frame made a matter of record before January 1, 1996, or January 1, 1995, is unavailable to new or prospective employers. This disingenuous maneuver is a violation of the Act.

Fourth, although the Act asserts in Section 114(a)(3) that the agency shall **ensure** that the driver to whom such safety-related information will have a reasonable opportunity to review and comment on such information, the FHWA has ignored this legislative directive and instead has adopted a laissez faire "policy" of leaving implementation to a motor carrier's discretion.

The agency has misled itself on the character of this federal law. It directs the **agency**, not motor carriers, to ensure that "employers have available to them critical information on a driver's prior safety performance while also affording the driver due process rights to respond to any information gathered." 1994 U.S.C.C.A.N. 1774. The FHWA relegates protection of drivers' due process rights to motor carriers. This is clearly insufficient and is certain to promote abuses that will occur unchecked by federal regulation, oversight, and enforcement. The agency must establish the parameters for unimpeded, timely inspection by a driver of the information transmitted on his or her three years of performance with prior employer(s). Without this federal oversight of due process, the agency will abet motor carrier practices that will contribute to undermining the purposes of the Act.

Lastly, we return to a consideration voiced at the outset of these comments -- the FHWA refusal to enshrine any penalties for failure to abide by any implementing regulations adopted by the agency. Although Congress clearly expects such penalties to be established as a result of agency rulemaking, it did not dictate their form. Unfortunately, absent a statutory command to the agency to adopt specific penalties for violation of the requirements of the Act, the FHWA refuses to act. Without penalties, some carriers will have no compunction about partial or complete dereliction of their obligations to ascertain the safety

records of candidate drivers prior to employment. There is little doubt that significant numbers of drivers will be hired without the appropriate background checks of their driving records and adherence to the FMCSRs. Advocates urges the FHWA to install realistic, appropriate sanctions for failures by motor carriers to abide by the obligations of the Act as imposed by federal regulations.

Advocates is dismayed by the overall stance of the agency in this rulemaking. It is another example of the well-known tendency of the FHWA's Office of Motor Carriers to re-interpret unambiguous statutory commands to accord with its regulatory predispositions. The agency apparently believes that its judgment on what the law should be is superior to that of Congress. The FHWA is mistaken if it believes that its discretion reaches so far that it can substitute its preferred course of action for legislated requirements. This proposal, as presented, is an open usurpation of Congressional prerogatives by the Executive.

Respectfully submitted,

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